Office - Supreme Court, U.S.
FILED
JUN 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2368

IN THE

# Supreme Court of the United States

October Term, 1981

ALEX J. ARMIJO, Commissioner of Public Lands
For the State of New Mexico,
*Petitioner,*

v.

ROGER A. JENSEN, PATRICIA BRENNER and
GEORGE B. McCUTCHEON II,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

JEFF BINGAMAN
*Attorney General of New Mexico*

DANIEL A. SANCHEZ
*Special Assistant Attorney General*

BILL R. GARCIA
*Special Assistant Attorney General*

Post Office Box 1148
Santa Fe, New Mexico 87504-1148
(505) 827-2743

VERGARA PRINTING CO. • SANTA FE, NEW MEXICO

## QUESTIONS PRESENTED

1. Whether the mineral reservation clause in the State Purchase Contract, as required by 43 U.S.C.A., Section 870, 44 Stats. at Large 1026, Chapter 557, which reserves "all coal and other minerals" includes gravel deposits which are in intense concentrations and are susceptible of commercial exploitation.

2. Whether the Purchase Contract issued to the Respondent is null and void for failure to comply with Section 10 of the New Mexico Enabling Act (Act of June 20, 1910, 36 Stats. at Large 557, Chapter 310) if in fact sand and gravel are found not to be minerals but instead are natural products of the land as covered by Section 10.

## TABLE OF CONTENTS


Page

QUESTIONS PRESENTED ..... i

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

A. THE FACTUAL BACKGROUND ..... 2

B. PROCEEDINGS IN THE COURT BELOW ..... 3

REASONS FOR GRANTING THE PETITION ..... 7

CONCLUSION ..... 10

APPENDIX A - Denial of Motion for Rehearing by the Supreme Court of the State of New Mexico ..... 1a

B - Opinion and Judgment of the Supreme Court of the State of New Mexico ..... 2a

C - Order and Judgment of the District Court of New Mexico, County of Dona Ana ..... 7a

D - New Mexico Enabling Act, Section 10, (Act of June 20, 1910, 36 Statutes at Large 557, Chapter 310) ..... 10a

E - Statutory Text. 43 U.S.C.A., Section 870, 44 Statutes at Large 1026, Chapter 557 ..... 14a

## TABLE OF AUTHORITIES

**CASES** Page

*Western Nuclear v. Andrus,*
475 F. Supp. 654, 664 F.2d 234 . . . . . .8, 10

**STATUTES**

New Mexico Enabling Act, Section 10
(Act of June 20, 1910, 36 Stats. at Large 557
Chapter 310) . . . . . i, 2, 4, 5, 6, 7, 9, 10

43 U.S.C.A., Section 870, 44 Stats. at Large 1026,
Chapter 557 . . . . . i, 2, 4, 7, 8

No. _____

IN THE

# Supreme Court of the United States

October Term, 1981

---

ALEX J. ARMIJO, Commissioner of Public Lands
For the State of New Mexico,
*Petitioner,*

v.

ROGER A. JENSEN, PATRICIA BRENNER and
GEORGE B. McCUTCHEON II,
*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

---

Alex J. Armijo, Commissioner of Public Lands for the State of New Mexico, petitions for a Writ of Certiorari to review the Opinion and Judgment of the Supreme Court of the State of New Mexico.

## OPINIONS BELOW

The Motion for rehearing denied by the Supreme Court of New Mexico on March 25, 1982 is unreported (App. A, *infra*, 1a). The judgment in this case by the Supreme Court of New Mexico on March 3, 1982 is also unreported (App. B, *infra*,

2a-6a). The judgment in this case by the District Court, County of Dona Ana, is unreported as well (App. C, *infra*, 7a-9a).

## JURISDICTION

The Motion for Rehearing was denied by the Supreme Court of New Mexico on March 25, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 10 of the Enabling Act for New Mexico, Act of June 20, 1910, 36 Stats. at Large 557, Chapter 310; (App. D, *infra*, 10a); and 43 U.S.C.A., Section 870, 44 Stats. at Large 1026, Chapter 557 (App. E, *infra*, 14a).

## STATEMENT OF THE CASE

### A. The Factual Background

Under the Enabling Act for New Mexico, Act of June 20, 1910, 36 Stats. at Large 557, Chapter 310, and confirming Patent No. 1188020, dated November 6, 1958, the State of New Mexico was granted all of Section 32, Township 18 South, Range 3 West, N.M.P.M., Dona Ana County, New Mexico by the United States Government.

Thereafter, on or about February 29, 1960, upon application of the respondent Jensen (hereinafter respondent), said Section 32 was offered for sale at public auction after the necessary appraisal and advertising for ten consecutive weeks and was sold to the respondent, whereupon Purchase Contract No. 4771 was issued to the respondent.

On March 23, 1960, the respondent assigned a three-quarter undivided interest in the contract to George B. McCutcheon II.

A copy of said assignment was filed with the Commissioner of Public Lands (hereinafter petitioner) on August 8, 1978.

On March 16, 1964, the petitioner's predecessor in office issued to the defendant State Highway Department, Sand and Gravel Lease No. M-14519 covering the South Half (S½) of the Northwest Quarter (NW¼) and the North Half (N½) of the Southwest Quarter (SW¼) of the aforementioned Section 32. Also, on or about March 16, 1969, the petitioner issued renewal Lease No. M-15361 to the State Highway Department, covering the same lands embraced in Sand and Gravel Lease No. 14519. Again, on March 16, 1974, the petitioner issued Renewal Lease No. M-15361 to the State Highway Department. Since then, the Highway Department has made application to the Commissioner for a subsequent renewal of Lease No. M-15361 covering this same acreage, which the petitioner has been holding in abeyance pending the final outcome of this suit.

After the issuance of Contract No. 4771, and while the aforementioned sand and gravel leases were in effect, the Highway Department removed sand and gravel from the land under the said sand and gravel leases of a value of $20,383.00 and paid this sum to the petitioner. All of the sand and gravel removed was used in the construction of public highways.

**B. Proceedings in the Courts Below**

On August 25, 1978, the respondent filed an inverse condemnation action in the New Mexico District Court in Dona Ana County, against the New Mexico State Highway Commission (hereinafter Commission) seeking damages for the Commission's removal of sand and gravel from real property being purchased by the respondent from the petitioner. The Commission then filed a third-party complaint against the petitioner on March 26, 1979, seeking indemnification for such amount the Commission might be found liable to the respondent. The petitioner

then counterclaimed against the respondent seeking to have the purchase contract declared null and void.

The petitioner took the position that sand and gravel were minerals and reserved from sale to the respondent under the mineral reservation clause in the purchase contract.

The respondent's claim below presented a single issue to the trial court: "Who owned the sand gravel in the property?" It was asserted that if the sand and gravel were not a mineral within the meaning of the mineral reservation clause set forth in the purchase contract, then the sand and gravel belonged to the respondent, and the Commission had to compensate the respondent for its removal.

When the third-party complaint was filed the second issue that was raised was whether the purchase contract to the respondent was void. The petitioner's counterclaim asserted that the value of the sand and gravel on the property had not been appraised at its true value before the property was sold to the respondent, therefore, the sale would have been void under the provisions of Section 10 of the Enabling Act for New Mexico, Act of June 20, 1910, 36 Stats. at Large 557, Chapter 310; and 43 U.S.C.A., Section 870, 44 Stats. at Large 1026, Chapter 557.

The parties stipulated to most of the facts before trial and tried only the two issues of whether sand and gravel are minerals reserved to the State under the terms of the purchase contract, and whether, if the sand and gravel were not minerals, the entire sale to the respondent was void.

The trial court found that prior to executing the contract, the respondent had approved an appraisal of the property which contained an affidavit listing gravel as a mineral; that sand and gravel had been removed from beneath an overburden of common dirt and rock; that the sand and gravel was of a kind

common throughout the length and breadth of the Rio Grande Valley, but that it " 'differed substantially from the material surrounding it on both sides of the valley;' that 86% of the sand and gravel was under two inches in diameter and 1% was from 3 to 12 inches in diameter; and that the sand and gravel was useful as surface aggregate for road building and for making commercial concrete." The Court then determined that the sand and gravel were minerals within the meaning of the mineral reservation clause in the purchase contract. Based on these findings of fact, the trial court dismissed the respondent's complaint with prejudice and declared that the sand and gravel belonged to the State under the reservation of minerals in the contract and that the sand and gravel leases from the petitioner to the Commission were good and valid leases. The Court did not rule on the issue of whether or not the contract was void, concluding that a ruling on that issue was no longer required because of the finding that the sand and gravel was not sold to the respondent and that, therefore, the property had been appraised at its true value, exclusive of the sand and gravel prior to sale.

On appeal to the Supreme Court of New Mexico, the respondent argued that absent an agreement between the parties, sand and gravel were not minerals. Moreover, it was asserted that the sand and gravel on the respondent's property possessed no exceptional characteristics or value which distinguishes them from the surrounding soils and that the contract documents contained no agreement that sand and gravel would be considered as minerals. It was also argued that under Section 10 of the New Mexico Enabling Act, *supra*, sand and gravel would be considered to be "natural or other products" of the land and not as minerals.

The petitioner argued three main points: (1) that sand and gravel were minerals within the understanding and contemplation of the parties by virtue of the fact that the sand and gravel on the respondent's property possessed the necessary

characteristics to classify it as a mineral, (2) that the documents in the case incorporate sand and gravel into the mineral reservation made by the State Land Office, and (3) that Section 10 of the New Mexico Enabling Act provides for the disposition of "natural or other products" of the land, while the disposition of minerals, including sand and gravel is controlled by the Legislature.

The Supreme Court of New Mexico reversed and found that absent a specific contractual provision to the contrary, common sand and gravel which possessed no exceptional characteristics, as that found in this case, were not minerals within the meaning of the mineral reservation of "all minerals" or "all minerals of whatsoever kind, including oil and gas," whether the provision appeared in the patent or in the purchase contract. The Court also stated that the use of the word "gravel" in the appraiser's non-mineral affidavit did not amount to a specific contract between the parties so as to constitute a reservation of sand and gravel. The Court also found that Section 10 of the Enabling Act was not violated. However, the Court simply stated that the Enabling Act, the New Mexico Constitution, nor the State Statutes precluded the petitioner from leasing or selling sand and gravel on state land, and further that the purchase of State Land by the respondent was a valid contract which included the sale of the sand and gravel.

Therefore, judgment was entered for the respondent against the Commission and petitioner for the sum of $20,383.00 representing the value of the sand and gravel removed from the premises. The counter-claim of the petitioner was dismissed. The cross-claim of the Commission against the petitioner was remanded for further consideration.

## REASONS FOR GRANTING PETITION

This case must be viewed against the statutory background of the New Mexico Enabling Act, Section 10, (Act of June 20, 1910, 36 Stats. at Large 557, Chapter 310) and 43 U.S.C.A., Section 870, 44 Stats. at Large 1026, Chapter 557. The decision of the Supreme Court of New Mexico failed to resolve the critical issue as to the disposition of sand and gravel with regard to the above-mentioned statutes. The petitioner's briefs below clearly presented the question that if sand and gravel were not minerals within the meaning of the mineral reservation and contemplation of the parties, then the disposition of the sand and gravel would be controlled by Section 10 of the Enabling Act.

This point must be placed in the proper perspective by briefly examining the history of this particular legislation. First of all, Section 10 of the Enabling Act was amended by Article 24 of the New Mexico Constitution, and the effect of this amendment was that minerals were taken out of the appraisal, advertising and competitive bid requirements of Section 10. This amendment allowed the state legislature to make all the necessary provisions for the disposition of minerals. However, those resources classified as "other or natural products" of the land would still be subject to the requirements of Section 10.

The need to amend Section 10 was made necessary by the passage of 43 U.S.C.A., Section 870, 44 Stats. at Large 1026, Chapter 557. This act provided that in the sale of state land, there would have to be a reservation of "all coal and other minerals" and that the failure to make this reservation would result in the forfeiture of the lands back to the United States government. The key provisions of this act state as follows:

> . . . . all sales, grants, deeds, or patents for any of the lands so granted shall hereafter by subject to and contain a reservation to the State of all the coal and

> other minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine and remove the same. The coal and other mineral deposits in such lands not heretofore disposed of by the State shall be subject to lease by the State as the State Legislature may direct, the proceeds and rentals and royalties therefrom to be authorized for the support or in aid of the common or public schools: *Provided*, that any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for the district in which the property or some thereof is located.

The provision in this Act requiring the reservation of "coal and other minerals" has been interpreted to also include the disposition of sand and gravel. (See *Western Nuclear v. Andrus*, 475 F. Supp. 654, 664 F.2d 234, where the court held that this particular mineral reservation was broad enough to include sand and gravel as a mineral. Although this case was reversed on appeal, a writ of certiorari has been granted by this Court to review that decision.)

It is our contention that the ultimate decision made by this Court in *Western Nuclear, supra*, will control the result in the case at bar. Therefore, for this reason, they should be considered in conjunction with one another. If this court should find that gravel is a mineral under the mineral reservation of Stock-Raising Homestead Act of 1916, then this should be the interpretation given to the mineral reservation used by the State of New Mexico which has been required by 43 U.S.C.A., Section 870, 44 Stats. at Large 1026, Chapter 557.

Because of the original holding of the Federal Court in *Western Nuclear, supra*, that sand and gravel are minerals which are reserved under the same wording in the Stock-Raising and Homestead Act of 1916 (i.e., "all coal and other

minerals") the ruling by the Supreme Court of New Mexico that sand and gravel are not minerals, and therefore not reserved, places the United States Attorney in a favorable position to bring a forfeiture action as to these particular lands along with between three to four million other acres of state trust land sold under similar circumstances. Because of this Act, if sand and gravel are minerals, as petitioner has contended, then they can be reserved and must be leased according to laws established by the legislature. However, if they are not minerals, then they would come under the guidelines of Section 10 of the Enabling Act, as being "other or natural products" of the land. This means in effect that they (sand and gravel) are part of the land itself and would have to be appraised at true value, advertised for ten weeks and sold at public auction.

If in fact sand and gravel were not intended to be reserved as a mineral, then Section 10 applies. However, these requirements were not met when the respondent purchased the land from the State. The failure to have complied with Section 10, therefore, rendered the purchase contract to the respondent void, or at least ineffective to convey the sand and gravel portion of the land. The pertinent provisions of Section 10 state as follows:

> All lands, leaseholds, timber, and other products of land before being offered shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed . . .
>
> Every sale, lease, conveyance or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this act shall be null and void, any provision of the constitution or laws of the said state to the contrary notwithstanding.

Therefore, the classification of the sand and gravel must either be that of a "mineral" or come under the term of "other or natural products" of the land. If it is the former, then the construction of the mineral reservation clause would have to be read so as to include sand and gravel. As mentioned previously this was the interpretation of the federal court in *Western Nuclear, supra.* If sand and gravel are not minerals, then the latter classification would apply. It is a matter of record that the requirements of Section 10 were not met, which must necessarily result in the respondent's contract being declared void or ineffective to convey the sand and gravel. Violation of this federal statute allows the circumvention of the Congressional intent to allow the state to produce revenues from these resources to aid the designated beneficiaries regardless of whether they are minerals or natural products of the land.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JEFF BINGAMAN
*Attorney General of New Mexico*

---

DANIEL A. SANCHEZ
*Special Assistant Attorney General*

BILL R. GARCIA
*Special Assistant Attorney General*

Post Office Box 1148
Santa Fe, New Mexico 87504-1148
(505) 827-2743

## APPENDIX A

IN THE
SUPREME COURT OF THE STATE OF NEW MEXICO
Thursday, March 25, 1982

No. 13,640

ROGER A. JENSEN, et al.,
Plaintiffs-Appellants,
vs.
STATE HIGHWAY COMMISSION,
et al.,
Defendants-Appellees.

Dona Ana County

This matter coming on for consideration by the Court upon Motion of Appellee for Rehearing, and the Court having considered said motion and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that motion of Appellee for rehearing be and the same is hereby denied.

ATTEST: A TRUE COPY
s / Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

## APPENDIX B

IN THE
SUPREME COURT OF THE STATE OF NEW MEXICO

ROGER A. JENSEN, PATRICIA BRENNER and GEORGE B. McCUTCHEON, II,
Plaintiffs-Appellants,

vs.

NO. 13, 640

STATE HIGHWAY COMMISSION OF THE STATE OF NEW MEXICO and ALEX J. ARMIJO, Commissioner of Public Lands,
Defendants-Appellees.

Supreme Court of New Mexico
FILED
MAR-3 1982
Rose Marie Alderete

APPEAL FROM
THE DISTRICT COURT OF DONA ANA COUNTY
Garnett R. Burks, Jr., District Judge

SUTIN, THAYER & BROWNE
NORMAN THAYER
Albuquerque, NM
Attorneys for Appellants

JEFF BINGAMAN, Attorney General
RICHARD L. RUSSELL, Chief Counsel
STEVE HAMILTON, Assistant Attorney General
Santa Fe, NM
Attorneys for Appellees State Highway Commission

JEFF BINGAMAN, Attorney General
WILLIAM D. JORDAN, General Counsel
DANIEL SANCHEZ, Assistant Attorney General
Santa Fe, NM
Attorneys for Appellee Alex J. Armijo

## OPINION

FEDERICI, Justice.

Plaintiffs-appellants Jensen, Brenner and McCutcheon (Jensen), filed a complaint in the District Court of Dona Ana County against the New Mexico State Highway Commission (Commission), seeking damages against the Commission by way of inverse condemnation for removal of sand and gravel from property being purchased by Jensen under purchase contract from the State of New Mexico, Commissioner of Public Lands (Land Commissioner). The Commission filed a third-party complaint against the Land Commissioner, seeking indemnification for any amounts for which the Commission might be found liable to Jensen. The Land Commissioner counterclaimed against Jensen, seeking to have Jensen's purchase contract declared void. After trial on the merits held before Judge Burks without a jury, the court entered its order and judgment dismissing Jensen's complaint and thereby the issues raised by the Commission's third-party complaint and the Land Commissioner's counterclaim became moot.

Jensen appeals. We reverse.

The parties stipulated to most of the facts before trial. In the findings of fact adopted by the trial court, the court found that the facts which had been stipulated to established that Jensen entered into a contract of purchase with the State of New Mexico. The contract contained a provision reserving to the State all of the minerals. The Land Commissioner entered into sand and gravel leases with the Commission, sand and gravel was removed from the premises and the value of the sand and gravel was $20,383.00.

With reference to the characteristics of this particular sand and gravel, the trial court found that it was of a kind common throughout the length and breadth of the Rio Grande Valley,

but that it "differed substantially from the materials surrounding on both sides of said valley," that 86% of the sand and gravel was less than two inches in diameter, that 1% was from 3 to 12 inches in diameter, and that the sand and gravel was useful as surfacing aggregate for road building and for making commercial concrete.

Two issues are involved:

I. Whether sand and gravel are minerals within a reservation of minerals to the State contained in the purchase contract between Jensen and the State.

II. Whether the agreement between Jensen and the Land Commissioner is null and void pursuant to the Enabling Act for New Mexico § 10 (Act of June 20, 1910, 36 Statutes at Large 557, Chapter 310), Pamphlet 3, N.M.S.A. 1978 (Enabling Act) ).

## I

This Court has consistently held that absent a specific contractural provision to the contrary, common sand and gravel possessing no exceptional characteristics, and being of the type found in this case, are not "minerals" under a general reservation of "all minerals" or "all minerals of whatsoever kind, including oil and gas," whether the provision appears in the patent or in the contract of purchase. *Rickelton v. Universal Constructors, Inc.*, 91 N.M. 479, 576 P.2d 285 (1978); *State ex rel. State Highway Commission v. Trujillo*, 82 N.M. 694, 487 P.2d 122 (1971).

In *Burris v. State ex rel. State Highway Commission*, 88 N.M. 146, 538 P.2d 418 (1975), this Court held that where the purchase contract with the State specifically reserved the gravel to the State, then gravel was included within the reservation of all minerals. No specific reservation in the contract of

purchase appears in this case. *Burris* is distinguishable. It does not apply.

The Land Commissioner argues that since the word "gravel" appears in Jensen's nonmineral appraiser's affidavit, it follows that the parties intended to reserve the sand and gravel to the State. We think this is too broad an interpretation to be given the language of the nonmineral appraiser's affidavit. The words of the affidavit do not amount to a specific contract between the parties by which they agree to reserve to the State the sand and gravel. If the State desires to reserve gravel and sand, it may do so by specific reservations in the purchase contract.

The provisions of the purchase contract, the nonmineral affidavit and the character of the sand and gravel which are the subject of this lawsuit are not dissimilar from those presented to this Court in *Rickelton, supra,* and *Trujillo, supra,* and the result in this case is controlled by the results reached in those cases.

II

The Land Commissioner contends that the present contract for the purchase of State land is void as being contrary to and prohibited by Section 10 of the Enabling Act. We disagree. Subject only to restrictions imposed under the Enabling Act, the New Mexico Constitution and statutes, the Land Commissioner has complete dominion over State lands. This control includes the right to sell lands and the right to lease lands for grazing and for prospecting, exploration, development and production of minerals, oil and gas. *See State v. District Court of Fourth Judicial Dist.*, 51 N.M. 304, 183 P.2d 611, *aff'g on rehearing*, 51 N.M. 297, 183 P.2d 607 (1947); *Burguete v. Del Curto*, 49 N.M. 292, 163 P.2d 257 (1945); *State ex rel. Otto v. Field*, 31 N.M. 120, 241 P. 1027 (1925); *Neel v. Barker*, 27 N.M. 605, 204 P. 205 (1922).

Neither the Enabling Act, the New Mexico Constitution nor our statutes precludes the Land Commissioner from leasing or selling the sand and gravel in said lands. The contract of purchase of State land by Jensen is a valid contract which includes the sale to Jensen of the sand and gravel.

The cause is remanded with direction to enter a judgment decreeing that the contract entered into between plaintiffs and the Land Commissioner is a valid contract which includes gravel and sand. The counterclaim of the Land Commissioner shall be dismissed. Judgment also shall be entered for plaintiffs against the Commission and the Land Commissioner for the sum of $20,383.00, representing the value of the sand and gravel removed from the premises.

The cause is also remanded for further consideration of the relief sought in the crossclaim filed by the Commission against the Land Commissioner. Plaintiff shall recover interest, costs and such other expenses as may be permitted by law.

IT IS SO ORDERED.

s/ William R. Federici
WILLIAM R. FEDERICI, Justice

WE CONCUR:

s/ Dan Sosa, Jr.
DAN SOSA, JR., Senior Justice

s/ H. Vern Payne
H. VERN PAYNE, Justice

s / William Riordan
WILLIAM RIORDAN, Justice

MACK EASLEY, Chief Justice (dissenting).

## APPENDIX C

STATE OF NEW MEXICO COUNTY OF DONA ANA
IN THE DISTRICT COURT

| | | |
|---|---|---|
| ROGER A. JENSEN, PATRICIA BRENNER, AND GEORGE B. McCUTCHEON II, Plaintiffs and Counter-defendants, | ) | |
| v. | ) | |
| STATE HIGHWAY COMMISSION OF THE STATE OF NEW MEXICO, Defendant and Third-party Plaintiff, | ) | NO. CV 78-417 |
| and | ) | |
| ALEX J. ARMIJO, Commissioner of Public Lands, Third-party Defendant and Counterclaimant. | ) | |

### ORDER AND JUDGMENT

The above-styled cause having come on for trial at the County Courthouse in Las Cruces, New Mexico, before the Honorable Garnett Burks, Jr.; Mary E. McDonald and Raymond W. Schowers of Sutin, Thayer, and Browne, a Professional Corporation, having appeared as counsel for Plaintiffs; Stephen S. Hamilton having appeared as counsel for the defendant State Highway Department; and William O. Jordan having appeared as counsel for Alex J. Armijo, Commissioner of Public Lands, and the Court having considered the testimony and evidence and otherwise being fully advised in the premises, and the Court having announced its decision by letter, the

parties having submitted the requested findings of fact and conclusions of law, and the Court having made its findings of fact and conclusions of law,

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

1. That the plaintiffs' action be and the same is hereby dismissed with prejudice.

2. The defendant State of New Mexico, acting through its Commissioner of Public Lands, is the owner of all the minerals of whatsoever kind, including oil and gas and sand and gravel, in, on, and under Section 32, Township 18 South, Range 13 West, N.M.P.M., together with the right to explore for, mine, and remove the same and to use the surface thereof in connection therewith, including the right of ingress and egress thereto and therefrom, and that the plaintiffs are entitled to compensation for any future damage done to any of their improvements upon said lands,

3. That the defendant State Highway Department is, and at all times material hereto, was the sand and gravel lessee of said Defendant Commissioner insofar as any of the issues in this proceeding are concerned.

4. That sand and gravel Lease No. M-14519 and all renewals thereof were and are valid leases, and the Commissioner is and was entitled to all rentals and royalties thereunder.

5. Plaintiffs are not the owners or nor are they entitled to payments for exploration, for mining, for production of, processing of, or removal of minerals, including sand and gravel from or under the premises described in Section 32, Township 18 South, Range 13 West, N.M.P.M., because the same were either reserved to the defendant Commissioner

under and by virtue of appraisal, agreements to pay, agreements to purchase, and sale and application.

GARNETT BURKS, JR., DISTRICT JUDGE

Approved:

MARY E. McDONALD, Attorney for
Plaintiffs

s / Stephen S. Hamilton
Stephen S. Hamilton, Attorney for
New Mexico State Highway Department

s/ William O. Jordan
WILLIAM O. JORDAN, Attorney for
Alex J. Armijo, Commissioner of
Public Lands

## APPENDIX D

### NEW MEXICO ENABLING ACT
### Section 10, (Act of June 20, 1910, 36 Statutes at Large 557, Chapter 310)

It is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said territory, are hereby expressly transferred and confirmed to the said state, shall be by the said state held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or of trust; provided, however, that the state of New Mexico, through proper legislation, may provide for the payment, out of the income from the lands herein granted, which land may be included in a drainage district, of such assessments as have been duly and regularly established against any such lands in properly organized drainage districts under the general drainage laws of said state.

No mortgage or other encumbrance of said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leassd, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of a county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have

been duly given by advertisement, which shall set forth the nature, time and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner and after the notice by publication thus provided for sales and leases of the lands themselves; provided, that nothing herein contained shall prevent said proposed state from Leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

All lands, leaseholds, timber and other products of land before being offered shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

Lands east of the line between ranges eighteen and nineteen east of the New Mexico principal meridian shall not be sold for less than five dollars [($5.00)] per acre, and lands west of said line shall not be sold for less than three dollars [($3.00)] per acre, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars [($25.00)] per acre; provided, that said state, at the request of the secretary of the interior, shall from time to time relinquish such

of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said state, to be selected from lands of the character named and in the manner prescribed in Section Eleven of this act.

There is hereby reserved to the United States and exempted from the operation of any and all grants made or confirmed by this act to said proposed state all land actually or prospectively valuable for the development of water powers or power for hydroelectric use or transmission and which shall be ascertained and designated by the secretary of the interior within five years after the proclamation of the president declaring the admission of the state; and no lands so reserved and excepted shall be subject to any disposition whatsoever by said state, and any conveyance or transfer of such land by said state or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants, there [shall] be, and is hereby, granted to the proposed state an equal quantity of land to be selected from land of the character named and in the manner prescribed in Section Eleven of this act.

Every sale, lease, conveyance or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this act shall be null and void, any provision of the constitution or laws of the said state to the contrary notwithstanding.

It shall be the duty of the attorney general of the United States to prosecute in the name of the United States and its courts such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the state or of any citizen thereof to enforce the provisions of this act; provided, that the secretary of the interior is hereby authorized in his discretion to accept on behalf of the United States, title to any land within the exterior boundaries of the national forests in the state of New Mexico, title to which is in the state of New Mexico, which the said state of New Mexico is willing to convey to the United States, and which shall be so conveyed by deed duly recorded and executed by the governor of said state and the state land commissioner, with the approval of the state land board of said state, and as to land granted to the said state of New Mexico for the support of common schools with the approval of the state superintendent of public instruction of said state, as to institutional grant lands with the approval of the governing body of the institution for whose benefit the lands so reconveyed were granted to said state, if, in the opinion of the secretary of agriculture, public interests will be benfited thereby and the lands are chiefly valuable for national forest purposes, and in exchange therefor, the secretary of the interior, in his discretion, may give not to exceed an equal value of unappropriated, ungranted, national forest or other government land belonging to the United States within the said state of New Mexico, as may be determined by the secretary of agriculture and be acceptable to the state as a fair compensation, consideration being given to any reservation which either the state or the United States may make of timber, mineral or easements.

## APPENDIX E

43 U.S.C.A., Section 870, 44 Stats. at Large 1026, Chapter 557

Subject to the provisions of subsections (a)–(c) of this section, the several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character, unless land has been granted to and/or selected by and certified or approved, to any such State or States as indemnity or in lieu of any land so granted by numbered sections.

(a) The grant of numbered mineral sections under this section shall be of the same effect as prior grants for the numbered non-mineral sections, and titles to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections.

(b) The additional grant made by this section is upon the express condition that all sales, grants, deeds, or patents for any of the lands so granted shall hereafter be subject to and contain a reservation to the State of all the coal and other minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands not heretofore disposed of by the State shall be subject to lease by the State as the State legislature may direct, the proceeds and rentals and royalties therefrom to be utilized for the support or in aid of the common or public schools: *Provided*, That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property or some part thereof is located.

(c) Except as provided in subsection (d) of this section, any lands included within the limits of existing reservations of or by the United States, or specifically reserved for water-power purposes, or included in any pending suit or proceeding in the courts of the United States, or subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such reservation, application, claim, or right is extinguished, relinquished, or canceled, and all lands in the Territory of Alaska, are excluded from the provisions of this section.

(d) (1) Notwithstanding subsection (c) of this section, the fact that there is outstanding on any numbered school section, whether or not mineral in character, at the time of its survey a mineral lease or leases entered into by the United States, or an application therefor, shall not prevent the grant of such numbered school section to the State concerned as provided by this section and section 871 of this title.

(2) Any such numbered school section which has been surveyed prior to July 11, 1956, and which has not been granted to the State concerned solely by reason of the fact that there was outstanding on it at the time of the survey a mineral lease or leases entered into by the United States, or an application therefor, is hereby granted by the United States to such State under this section as if it had not been so leased; and the State shall succeed the position of the United States as lessor under such lease or leases.

(3) Any such numbered school section which is surveyed on or after July 11, 1956, and on which there is outstanding at the time of such survey a mineral lease or leases entered into by the United States, shall (unless excluded from the provisions of this section by subsection (c) of this section for a reason other than the existence of an outstanding lease) be granted to the State concerned immediately upon completion of such survey, and the State shall succeed to

the position of the United States as lessor under such lease or leases.

(4) The Secretary of the Interior shall, upon application by a State, issue patents to the State for the lands granted by this section and section 871 of this title, in accordance with section 871a of this title. Such patent shall, if the lease is then outstanding, include a statement that the State succeeded to the position of the United States as lessor at the time the title vested in the State.

(5) Where at the time rents, royalties, and bonuses accrue the lands or deposits covered by a single lease are owned in part by the State and in part by the United States, the rents, royalties, and bonuses shall be allocated between them in proportion to the acreage in said lease owned by each.

(6) As used in this subsection, "lease" includes "permit" and "lessor" includes "grantor". Jan. 25, 1927, c. 57, § 1, 44 Stat. 1026; May 2, 1932, c. 151, § 1, 47 Stat. 140; Apr. 22, 1954, c. 169, §§ 1, 2, 68 Stat. 57; July 11, 1956, c. 572, 70 Stat. 529.

No. 81-2368

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ALEX J. ARMIJO, Commissioner
of Public Lands for the State
of New Mexico,

Petitioner,

v.

ROGER A. JENSEN, PATRICIA
BREMNER, and GEORGE B.
McCUTCHEON, II,

Respondents.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW MEXICO

# BRIEF OF RESPONDENTS ROGER A. JENSEN, PATRICIA BREMNER, and GEORGE B. McCUTCHEON, II

Ronald J. Segal
Counsel of Record

Irwin S. Moise

SUTIN, THAYER & BROWNE
A Professional Corporation
P. O. Box 1945
Albuquerque, New Mexico 87103
(505) 842-8200

TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES . . . . . | ii |
| TIME FOR FILING RESPONSE TO PETITION . . . . . | 1 |
| REQUEST FOR DAMAGES AND COSTS . . | 1 |
| THE UNITED STATES SUPREME COURT LACKS JURISDICTION TO REVIEW THE DECISION OF THE NEW MEXICO SUPREME COURT IN THIS ACTION BECAUSE THE DECISION RAISES NO FEDERAL QUESTION . . . . . | 2 |
| CONCLUSION . . . . . | 20 |

## TABLE OF AUTHORITIES


CASES — PAGES

Miller's Executors v. Swann, 150 U.S. 132 (1893). . . . . 10-11, 11-12,13

Missouri Pacific Railway Co. v. Fitzgerald, 160 U.S. 556 (1896). . 14

Webb v. Webb, 451 U.S. 493 (1981). . 20

Western Nuclear v. Andrus, 664 F.2d 234 (10 Cir. 1981) certiorari granted . . . . . 9,16

White v. Leovy, 174 U.S. 91 (1899) . . . . . 14,15-16

STATUTES

New Mexico Enabling Act, Ch. 310, Section 10, 36 Stat. 557, 563 (1910). . . . . 6,10,19

28 U.S.C.A. Section 1257(3) (West Supp. 1982) . . . . . 2,20

43 U.S.C.A. Section 870 (1964) . . . . . 4,6,7,8,13

Materials Act of 1947, 30 U.S.C.A. Sections 601-604 (1976). . . . 17-18

Stock-Raising Homestead Act, 43 U.S.C.A. Sections 291-301 (1964) . . . . . 7,8,10, 17,18

SUPREME COURT RULES

Rule 17. . . . . 2

Rule 21(h) . . . . . 20

Rule 22.1. . . . . 1

Rule 49.1. . . . . 2

Rule 49.2. . . . . 1

Rule 50.1. . . . . 2

## TIME FOR FILING RESPONSE TO PETITION

Respondents received three copies of the Petition for Writ of Certiorari in this action by hand-delivery on June 28, 1982. Respondents' Brief in Opposition to the Petition for Writ of Certiorari is therefore due on or before July 28, 1982, pursuant to Rule 22.1 of the Supreme Court Rules.

## REQUEST FOR DAMAGES AND COSTS

The Petition for Writ of Certiorari in this action is frivolous, as the United States Supreme Court clearly lacks jurisdiction to entertain the petition. Respondents therefore ask this Court to award appropriate damages to respondent pursuant to Rule 49.2 of the Supreme Court Rules, plus

interest and costs pursuant to Rule 49.1 and Rule 50.1 of the Supreme Court Rules.

## THE UNITED STATES SUPREME COURT LACKS JURISDICTION TO REVIEW THE DECISION OF THE NEW MEXICO SUPREME COURT IN THIS ACTION BECAUSE THE DECISION RAISES NO FEDERAL QUESTION

This Court's jurisdiction to grant the writ of certiorari requested by petitioner is governed by 28 U.S.C.A. § 1257(3) (West Supp. 1982). Both that statute and Rule 17 of the Supreme Court Rules, governing review on writ of certiorari, require that this Court will not consider a petition for writ of certiorari to a state court of last resort unless: (a) a federal question has been decided by the state court in a manner

in conflict with a state or federal court decision; or (b) the state court has decided an important question of federal law which should be settled by this Court. In the context of this case, because no United States constitutional right or treaty is involved, a reviewable federal question will have been presented only if the New Mexico Supreme Court decision has directly "drawn into question" the validity of a federal statute, or if a party to the action claimed a right or title under a federal statute.

No issue of federal law was presented to or decided by the New Mexico Supreme Court in this case. The basic facts of the case were outlined by petitioner in his Statement of the

Case. We repeat the facts necessary to the jurisdictional question. The United States, by 43 U.S.C.A. § 870 (1964), granted certain land to New Mexico subject to the requirement that when New Mexico disposes of any of the land all the minerals must be reserved to the State. If any of the land is disposed of by New Mexico "contrary to" that requirement, the United States Attorney General may seek forfeiture of such land back to the United States.

New Mexico sold one section of such land to respondents, under a 30 year purchase contract. Under the specific terms of the purchase contract "all minerals" were reserved to New Mexico. In this action, the

parties called upon the New Mexico courts to construe whether the mineral reservation included a reservation of sand and gravel. The New Mexico Supreme Court followed New Mexico common law in construing the mineral reservation to not include sand and gravel under the particular facts of this case. Respondents were therefore determined to be the purchasers of the sand and gravel as part of the property purchased under the purchase contract. The New Mexico Supreme Court did not decide that sand and gravel were <u>never</u> to be considered minerals, but only that under tests established by the Court in previous cases, sand and gravel having the characteristics of the material at issue in this case

were not minerals absent a contractual provision to the contrary.

The New Mexico Supreme Court also reviewed a factual issue as to whether the sale of the property, including the sand and gravel, had been conducted in compliance with the New Mexico Enabling Act, Ch. 310, § 10, 36 Stat. 557, 563 (1910).

Petitioner argues at p. 7 of the Petition for Writ of Certiorari that the decision of the New Mexico Supreme Court "failed to resolve the critical issue as to the disposition of sand and gravel with regard to" Section 10 of the New Mexico Enabling Act and 43 U.S.C.A. § 870. Petitioner did not argue at either the trial court or the New Mexico Supreme Court, and does not

appear to argue now, that federal law governs the construction of the reservation of "all minerals" in respondents' purchase contract. Petitioner argues only that because 43 U.S.C.A. § 870 requires New Mexico to reserve all minerals when selling tnese lands, the construction of such a mineral reservation should be the same as for a reservation of "coal and other minerals" in patents issued under the federal Stock-Raising Homestead Act, 43 U.S.C.A. §§ 291-301 (1964). Tne only reason urged for that proposition is petitioner's fear tnat if New Mexico law differs from federal law on this issue, even tnougn under a totally different statute, the United States Attorney General may seek

forfeiture back to the United States of lands granted to New Mexico by 43 U.S.C.A. § 870.

Petitioner points out that the United States Court of Appeals for the Tenth Circuit has determined that a reservation of "coal and other minerals" in a patent issued by the United States under the federal Stock-Raising Homestead Act does not reserve sand and gravel, and that this Court has granted a writ of certiorari to the Tenth Circuit Court of Appeals to review that decision. Petitioner then argues as follows:

> It is our contention that the ultimate decision made by this Court in Western Nuclear, supra, will control the result in the case at bar.

> Therefore, for this reason, they should be considered in conjunction with one another. If this court should find that gravel is a mineral under the mineral reservation of [sic] Stock-Raising Homestead Act of 1916, then this should be the interpretation given to the mineral reservation used by the State of New Mexico which has been required by 43 U.S.C.A., Section 870, 44 Stats. at Large 1026, Chapter 557. (Empnasis added.)
>
> p. 8, Petition for Writ of Certiorari.

The future United States Supreme Court decision in Western Nuclear v. Andrus, 664 F.2d 234 (10th Cir. 1981) cert. granted, will "control" the construction of the reservation of minerals in this case only if the construction of the mineral reservation

in respondents' purchase contract is clearly a question of federal law, rather than state law, and then only if federal decisions under the Stock-Raising Homestead Act are held to be applicable to the facts of this case and to govern the construction of contracts entered into pursuant to the New Mexico Enabling Act. Petitioner cites no authority for the proposition that the construction of this private contract is governed by federal law and, in fact, does not argue that the issue is one of federal law. As we stated above, petitioner urges only that the state law should be the same as federal law. This argument was long ago rejected by the United States Supreme Court in Miller's Executors v.

Swann, 150 U.S. 132 (1893) as not involving a federal question.

In Miller's Executors, the United States Supreme Court dismissed a petition for review of a decision of the Supreme Court of Alabama which construed both a state statute concerning lands originally granted to Alabama by the United States, and a mortgage held by the State on those lands. The United States Supreme Court discussed its lack of jurisdiction over such a case, as follows:

> The fact that the State statute and the mortgage refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the State, does not make the determination of such rights a Federal question. A State may

prescribe the procedure in the Federal courts as the rule of practice in its own tribunals; it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the acts of Congress, the rules of the Federal courts, and the practices of the Land Department, and yet the questions for decision would not be of a Federal character. The inquiry along Federal lines is only incidental to a determination of the local question of what the state has required and prescribed. The matter decided is one of state rule and practice. The facts by which that state rule and practice are determined may be of a Federal origin.
(Emphasis added.)

Miller's Executors, 150 U.S. at 136-137.

The reasoning of the United States Supreme Court in Miller's Executors is directly applicable to petitioner's argument in this case. Even if the New Mexico courts should look to federal decisions in construing the mineral reservation at issue in this case, a proposition with which we do not agree, the construction is not therefore an issue of federal law.

The fact that the property under consideration in tnis action was granted to tne State of New Mexico by the United States does not make tne construction of a subsequent purcnase contract between New Mexico and a private party a matter for federal law. Tne validity of 43 U.S.C.A. § 870, requiring a reservation of minerals, was

not and is not now challenged, nor is any construction of that statute brought into issue in this case. The New Mexico Supreme Court denied no right claimed under that federal statute. See Missouri Pacific Railway Co. v. Fitzgerald, 160 U.S. 556 (1896).

The issues in this case are similar to the issues in White v. Leovy, 174 U.S. 91 (1899), in which the United States Supreme Court reviewed a state court decision construing the extent of property granted by separate patents from the State of Louisiana to both parties to the action. The land at issue had originally been granted to Louisiana by the United States, and the first of the two subsequent patentees from Louisiana argued that his

patent covered accretions to the property and was therefore in conflict with (and superior to) the second patent. The Louisiana Supreme Court construed the two patents and determined the interests acquired by the two patentees. The United States Supreme Court pointed out that no federal question was involved in the state court decision, stating as follows:

> It is manifest no Federal question was passed on by the court. Its decision was put upon an independent ground involving no Federal question and of itself sufficient to support the judgment. It merely determined the extent of the grant to the State, and, interpreting the contending patents as conveyances, decided that the

> lands described in that of plaintiff did not embrace the lands in controversy, and that the lands described in that of defendant did embrace them. This was but the interpretation of written instruments, and if it were even apparent to us to be wrong, which we cannot say, we should nevertheless be without power to review it. (Emphasis added.)
>
> White, 174 U.S. at 95-96

This Court's jurisdiction over this case is distinguishable from the Court's jurisdiction over the issues raised in Western Nuclear. Western Nuclear involves federal court review of a federal administrative action brought by the United States Department of the Interior against Western Nuclear for trespass. Western Nuclear

was the successor in interest to the patentee of land from the United States under the Stock-Raising Homestead Act. The administrative action was brought by the United States against Western Nuclear for removing sand and gravel from the patented property. If a reservation of "all the coal and other minerals" in the United States patent to Western Nuclear's predecessor did not reserve the sand and gravel to the United States, Western Nuclear did not trespass on the United States' interest by removing sand and gravel from the property. That case is an action brought by the United States, for violation of the United States Materials Act of 1947, 30 U.S.C.A. § 601-604

(1976), involving a construction of a United States patent issued pursuant to the United States Stock-Raising Homestead Act.

In this case the state of New Mexico, not the United States, was the grantor of state land to respondents. The action was brought by respondents against the New Mexico State Highway Commission for alleged taking of sand and gravel from respondents' lands. The action was brought under a New Mexico statute creating a cause of action for inverse condemnation. The New Mexico Supreme Court decision in this action clearly treated the construction of respondents' purchase contract as a question of state law. The New Mexico Supreme Court decision

does not refer to any federal law with respect to that issue. The first question presented by the Petition for Writ of Certiorari is therefore a question solely of state law, over which this Court lacks jurisdiction.

The second issue raised by petitioner in the Petition for Writ of Certiorari was that the requirements of Section 10 of the New Mexico Enabling Act were not complied with in the sale to respondents. That issue involves only a question of fact which raises no federal question as to the validity of the New Mexico Enabling Act, and no right arising under that Act. This Court therefore has no jurisdiction to review that issue.

Petitioner has not complied with

Rule 21(h) of the Supreme Court Rules, which requires petitioner to specify in the statement of the case when and in what manner the federal questions sought to be reviewed were raised in the courts below. This Court can only have jurisdiction over a federal question "if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." Webb v. Webb, 451 U.S. 493, 496-497 (1981).

## CONCLUSION

The United States Supreme Court does not have jurisdiction under 28 U.S.C.A. § 1257(3) to review the decision of the Supreme Court of New Mexico in this action, because the

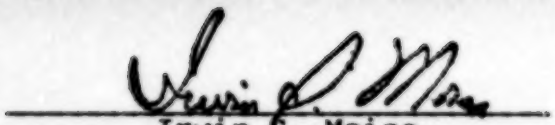
decision raises no question of federal law and the decision rests upon adequate state grounds. Even if a federal question is raised by the petition for writ of certiorari, no such question was urged before the New Mexico Supreme Court, or ruled on by that Court. Respondents therefore ask the United States Supreme Court to deny the Petition for Writ of Certiorari in this action.

Respectfully submitted,

SUTIN, THAYER & BROWNE
A Professional Corporation

By
Ronald J. Segel

and



Irwin S. Moise
Attorneys for Respondents
600 First Plaza
P. O. Box 1945
Albuquerque, New Mexico 87103
(505) 842-8200

CERTIFICATE OF SERVICE

We hereby certify that we have mailed three copies of the foregoing pleading to opposing counsel of record this 26th day of July, 1982.

SUTIN, THAYER & BROWNE
A Professional Corporation

By /s/ RONALD SEGEL